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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 863

MRS. ANNE MARTIN,
divorced wife of Luke Blackburn, Jr.,
Petitioner,

versus

TOYE BROS. AIRPORT SERVICE, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
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MRS. ANNE MARTIN,
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TOYE BROS. AIRPORT SERVICE, INC.,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Mrs. Anne Martin, divorced wife of Luke Blackburn, Jr., respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeal for the Fifth Circuit entered in the above cause on January 13, 1960, and the order of said Court denying rehearing thereof, entered on March 10, 1960.

CITATIONS TO OPINIONS BELOW

The District Court did not write an opinion in this case.

The opinjon of the Circuit Court of Appeal, printed in Appendix A hereto *infra*, p. 10, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 13, 1960 (R. 377), Appendix A, *infra*, p. 13. Rehearing was denied on March 10, 1960 (R. 377), Appendix A, *infra*, p. 14. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1332.

QUESTIONS PRESENTED

Should the Circuit Court of Appeals have ordered a new trial, limited to the question of damages only, where the record was patent on its face that the verdict of the jury was so shockingly inadequate as to make it an abuse of its discretion in awarding only TWO THOUSAND SEVEN HUNDRED FIFTY AND NO/100 ($2,7500.00) DOLLARS, or less than one-third (1/3) of the special damages consisting of SIX THOUSAND THREE HUNDRED NINETY-EIGHT AND 84/100 ($6,398.84) DOLLARS, for loss of wages and TWO THOUSAND SEVENTY-SIX AND 93/100 ($2,-076.93) DOLLARS, for medical, hospital and surgical fees.

The award obviously did not include general damages.

STATEMENT OF THE CASE

The plaintiff, a citizen of the State of Florida, was a fare-paying passenger in the defendant's limousine, which was owned and operated by the Louisiana Corporation, and which ran into the rear of a vehicle which had stopped for a red light on Tulane and South Broad Avenue in the City of New Orleans, State of Louisiana.

As a result of the impact, the plaintiff was hospitalized for one (1) week because of injuries to the neck, a large hematoma in the abdomen, back, chest and buttocks.

Because of continued complaints in the lumbar area, myelographic studies were performed. She ultimately underwent an operation for the removal of a ruptured disc, which has left her permanently and partially disabled, and which prevents her from performing her duties of hair stylist on a full-time basis.

The only medical witness produced by the defendant was a physician and surgeon, who was not tendered as an expert, and who examined the plaintiff some thirty-nine (39) months after the accident occurred, and nine (9) days before trial.

REASONS FOR ALLOWANCE OF THE WRIT

The Circuit Court of Appeal has rendered a decision in conflict with its own decisions and the decisions of another court of appeal on the same matter.

ARGUMENT

In *Legler vs Kennington Saenger Theatres, Inc.*, 5 Cir. 172 Fed. 2d 982 (1949) the Court below stated:

> "The jury found that the plaintiff was entitled to recover, and, if she was, it seems absurd to us that she was awarded only nominal damages." See *Dixon v. Breland*, 6 So. 2d 122; *Stetson v. Stindt*, 279 Fed. 209; *United Press Assoc. v. National Newspapers Assoc.*, 254 Fed. 284, *Of. Woodward v. Atlantic Coast Line R.R. Co.*, 57 F. 2d 1019."

In *Indamer Corporation v. Crandon*, 5 Cir. 217 Fed. 2d. 391 (1954), the Court below, in commenting on the prejudicial statement by defense counsel that he would show the jury that the plaintiff had no interest whatever in the outcome of the suit, and then his subsequent failure to produce any evidence which even under his contention would make it proper, stated that the circumstances there present:

> "* * * makes it inappropriate for us to consider the baneful effect of the improper statement in considering whether the trial court abused its discretion in denying a partial new trial on the issue of damages where the damages awarded were only a fractional part (27%) of the cost of the plane as proved by plaintiffs on the issue of value and 20% of the value as testified to by a disinterested witness."

In ordering a new trial, the Court further stated:

> "Here the jury necessarily found defendants liable for the negligent destruction of the plane; otherwise no verdict would have been found for the plaintiff."

As was stated in *United Press Association v. National Newspapers Association*, 254 Fed. 284, wherein a verdict in favor of the plaintiff was in an insignificant amount much less than the undisputed evidence showed plaintiff was entitled to recover:

> "It is our opinion that the trial judge, being an integral part of the court charged with the duty and responsibility of seeing that justice was administered between the parties, should have granted a new trial, and that this failure so to do was an abuse of his discretion. The jury not only disregarded the undisputed evidence in the case, but also the charge of the court."

In *Stetson v. Stindt*, 279 Fed. 209, it was held that (quoting the syllabi):

> "An instruction stating the amount of defendant's liability, if liable at all, is an instruction on the law and a verdict for a smaller sum unsupported by any evidence, is contrary to the law of the case, and should have been set aside.
>
> "While it is the rule of the federal courts that a motion for a new trial is addressed to the discre-

tion of the trial court, and its ruling thereon is not reviewable, where a verdict is directly contrary to the instructions of the court and without evidence to support it, a motion to set it aside and for a new trial is in effect an exception to the verdict, which does not call for an exercise of discretion, but for a ruling on a question of law, which is reviewable."

In *Stetson v. Stindt, supra,* many cases are cited in support of the proposition that an instruction on the measure of damages is an instruction on the law:

"On this general law some courts have squarely met the question and have held that an instruction on the measure of damages is an instruction on the law, that a verdict by the jury in disregard of such instruction calls for a new trial, and that, under these circumstances, refusal by the trial court to grant a new trial constitutes reversible error."

In *Pugh v. Bluff City Excursion Company,* 177 Fed. 399, the Court stated that the rule that the granting or denying of a motion for a new trial is an exercise of discretion, which will not be reviewed, does not apply where the verdict is inconsistent on its face and shows an abuse of power on the jury's part, and where a verdict is inconsistent on its face and shows an abuse of the jury's power, the court's obligation to grant a new trial is a positive duty and is not discretionary.

In *Devine v. Patterson,* 6 Cir. 242 Fed. 2d. 828 (1957), the plaintiff incurred; over $19,000.00, mainly in attorney fees

and travel expenses, for the successful defense of a malicious prosecution charge. That expenditure was not disputed. However, the jury returned a verdict for the plaintiff allowing him only compensatory damages in the sum of $500.00, and punitive damages in the sum of $1.00. In holding that the District Court should have granted a new trial, the Court stated:

> "Since the verdict was less than the amount of the loss shown and not disputed, the motion for a new trial should have been granted. We see no essential difference between physical damage suffered in a personal injury case and professional and psychological damage suffered in the trial of a criminal case. While there was controversy as to defendant's liability, there was not controversy as to the necessity of plaintiff's incurring the expenses listed nor as to the fact that they were actually incurred. The award of $500. was around 1/40 of the actual and specific damages proved and nothing was allowed for the undisputed injury shown to have been suffered by plaintiff in his professional reputation, standing, and loss of practice.
>
> "While in general the granting of a new trial is a matter of discretion with the court, it is not so when the verdict is inconsistent on its face. *Pugh v. Bluff City Excursion Company*, supra. The jury found plaintiff was entitled to recover. In view of the undisputed evidence as to expense caused by the wrongful prosecution it is evident that the jury did not comply with the instructions of the court.

"The District Court erred in not granting a new trial limited to the question of compensatory damages. Federal Rules of Civil Procedure, rule 59 (a) 28 U.S.C., Chesevski v. Strawbridge & Clothier, D.C. 25 F. Supp. 325; *Barron and Holtzoff*, Federal Practice and Procedure, Vol. 3, Par. 1304, and Par. 1307, which reads as follows:

"If issues are framed for the jury and the issue as to which a new trial is required is separate from all other issues, and the error requiring a new trial does not affect the determination of any other issue, the scope of the new trial may be limited to the single issue. Thus new trials have been limited to the issue of damages. * * *"

In the case at Bar, there is no question of liability, since the defendant's counsel admitted liability to the jury.

It is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this Court; that the decision of the Court of Appeal should be reversed; and that the District Court be ordered to grant a new trial, limited to the question of damages.

Respectfully submitted,

FELICIEN Y. LOZES
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New Orleans 12, La.

C. CYRIL BROUSSARD
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1008 American Bank Building
New Orleans 12, Louisiana

CERTIFICATE

I hereby certify that a copy of the foregoing petition for certiorari to the United States Supreme Court has been served on Messrs. Deutsch, Kerrigan and Stiles, attorneys for Toye Bros. Airport Service, Inc., by placing the same properly addressed in the United States mail with adequate postage affixed thereto.

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17,909

MRS. ANNE MARTIN, divorced wife of Luke Blackburn, Jr.,

Appellant,

versus

TOYE BROS. AIRPORT SERVICE, INC.,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(January 13, 1960.)

Before RIVES, Chief Judge, and HUTCHESON and CAMERON, Circuit Judges.

PER CURIAM: The suit was for damages for personal injuries sustained by plaintiff while a passenger in defendant's limousine. The claim was that, as a result of the defendant's negligence in running the limousine into the rear of a vehicle which had stopped for a red light, plaintiff was thrown to the floor and received serious and painful injuries, to her damage in the sum of $184,550.00.

The defense was that the accident was caused by the negligent stopping of the vehicle in front of defendant's limousine and defendant was not negligent. In addition, the defendant specifically alleged that the accident was quite minor and the serious injuries and condition of which plaintiff complained were not caused thereby.

On the trial of the case, the issues, of whether the accident was serious or trivial, and whether the condition of which plaintiff complains and the serious injuries she claims to have received resulted in any manner from the accident, were paramounted on both sides, and the verdict awarding plaintiff $2750.00 apparently turned on the question whether and to what extent the injuries plaintiff claimed to have been suffering from and to have been treated for were attributable to the accident. No objections were made or exceptions reserved to any of the testimony.

At the conclusion of the evidence, the district judge gave a fair and full charge, to which plaintiff made no objection, and plaintiff's appeal is predicated entirely on her claim that, under the evidence in the case, including the stipulation that medical expenses incurred by her since the accident were $2076.93, the verdict of $2750.00 was so shockingly inadequate as to make it an abuse of discretion, indeed reversible error for the trial court not to set it aside.

Here, pointing to the mass of medical testimony as to her sufferings and condition, appellant insists that the verdict must have been the result of passion and prejudice and a complete ignoring of the evidence in the case.

Appellee, however, points out that the stipulation, as to medical expenses incurred by her since the accident, was a mere summation of the amounts of medical expense she claimed to have expended *since*, and was in no sense an agreement that they had been expended *because* of, the accident. So pointing to the evidence as a whole, appellee insists that the question of whether appellant suffered any appreciable injury and the nature and extent of it were questions of fact for the jury, and these questions have been settled adversely to plaintiff by the jury verdict.

Impressed as we are with the earnestness and sincerity of appellant's claim, that the verdict represents a shocking failure on the part of the jury to discharge its function, we are unable to agree with her; that the evidence was all one way; that there was no basis in it for a jury finding that the accident did not result in a serious injury to plaintiff; and, that therefore, the verdict must be set aside as the result of passion and prejudice and a complete ignoring of the evidence. On the contrary, we think that the jury could have found, and did find, that plaintiff did not prove that the injuries she claimed to be suffering from were caused by the accident in suit. In short, we are of the view: that the case and the issues in it were for the jury; that no showing having been made that error attended the trial, the action of the district judge in refusing at plaintiff's instance to set the verdict aside was not reversible error; and that the judgment must be affirmed.

AFFIRMED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MRS. ANNE MARTIN, divorced wife of
Luke Blackburn, Jr.,

versus No. 17909

TOYE BROS. AIRPORT SERVICE, INC.

JUDGMENT

Extract from the Minutes of January 13, 1960.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the appellant, Mrs. Anne Martin, divorced wife of Luke Blackburn, Jr., be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MRS. ANNE MARTIN, divorced wife of
Luke Blackburn, Jr.,

versus No. 17909

TOYE BROS. AIRPORT SERVICE, INC.

ORDER DENYING REHEARING

Extract from the Minutes of March 10, 1960.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

IN THE
DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

MRS. ANNE MARTIN, ETC.,
versus No. 6243 Civil Action
TOYE BROS. YELLOW CAB CO. ETC.
ET AL.

JUDGMENT

Filed: Mar. 13, 1959

By reason of the verdict of the jury rendered herein, and in accordance therewith;

IT IS ORDERED, ADJUDGED AND DECREED BY THE COURT that judgment be and is hereby entered in favor of Plaintiff, MRS. ANNE MARTIN, divorced wife of Luke Blackburn, Jr., and against Defendant, TOYE BROS. AIRPORT SERVICE, INC., in the full and true sum of Two Thousand Seven Hundred Fifty & no/100 ($2,750.00) Dollars, together with legal interest and costs.

MINUTE ENTRY:
March 11, 1959
Christenberry, J:

IN THE
DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

MRS. ANNE MARTIN.
Divorced wife of Luke Blackburn, Jr.

versus No. 6243 CA

TOYE BROS. YELLOW CAB CO CO., ET AL.

JUDGMENT DENYING NEW TRIAL

Filed: April 10, 1959

This cause came on this day to be heard on motion of plaintiff for a new trial.

Present:
C. Cyril Broussard, Esq.,
Attorney for Plaintiff
Breard Snellings, Esq.,
Attorney for Defendants

Argument;

IT IS ORDERED BY THE COURT that the motion of plaintiff for a new trial be and the same is hereby DENIED.

MINUTE ENTRY:
April 8, 1959
Christenberry, J: